(13)

No. 92-1500

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PAUL CASPARI, Superintendent of the Missouri State Eastern Correctional Center, et al.,

Petitioner,

vs.

CHRISTOPHER BOHLEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should *Bullington* v. *Missouri* be overruled?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of petitioner in the above captioned case. Counsel for petitioner has consented, but counsel for respondent has refused consent.

In the accompanying brief, *amicus* argues that *Bullington* v. *Missouri* ought to be overruled.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and

reliable determination of guilt and swift execution of punishment.

Swift and sure punishment is an essential feature of any worthwhile criminal justice system. *Bullington*, by needlessly importing double jeopardy concepts into sentencing hearings, makes the sentencing process needlessly complex and too prone to giving windfalls to guilty defendants. This undermining of the criminal justice system is contrary to the interests CJLF was formed to protect.

For the foregoing reasons, *amicus curiae* requests leave to file its brief.

July, 1993

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

SUMMARY OF FACTS AND CASE

On July 1, 1982, respondent Bohlen was convicted on three counts of first-degree robbery. On October 15, 1982, he was sentenced by the trial court to three consecutive 15-year terms as a persistent offender. The record did not show that any evidence of the necessary prior convictions for a persistent offender finding was presented at the trial or the sentencing hearing. *Bohlen* v. *Caspari*, 979 F. 2d 109, 110 (CA8 1992). His conviction was affirmed but the case was sent back for resentencing because of a lack of proof of his persistent offender status. On remand, the trial court found that he was a persistent offender and imposed the same sentence. *Ibid*. The Missouri Court of Appeals upheld the second sentence on the ground that the Double Jeopardy Clause

does not apply to sentencing. *State* v. *Bohlen*, 698 S. W. 2d 577, 578 (Mo. Ct. App. 1985).

On September 15, 1989, Bohlen petitioned for federal habeas corpus. The District Court denied the petition, but the Eighth Circuit reversed, holding that the resentencing violated *Bullington* v. *Missouri*, 451 U. S. 430 (1981). 979 F. 2d, at 115.

SUMMARY OF ARGUMENT

Stare decisis does not preclude a re-examination of *Bullington* v. *Missouri*. That case contradicts prior precedents without overruling them. This creates confusion and disrespect for precedent, contrary to the interests *stare decisis* seeks to protect. Because *Bullington* is a constitutional decision, it must be afforded less protection under *stare decisis*. As *Bullington* has also been compromised by *Poland* v. *Arizona*, it should be re-examined.

Bullington should be overruled. It is contrary to both the history of the Double Jeopardy Clause, and this Court's interpretation of it. By focusing on the procedure involved rather than the hearing's consequences to defendant, *Bullington* is contrary to the principles of the Double Jeopardy Clause. Finally, as it punishes states for expanding protections to defendants, *Bullington* discourages state experimentation in criminal procedure in a particularly inappropriate matter.

ARGUMENT

I. *Stare decisis* does not prevent *Bullington* from being overturned.

In *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984), this Court declined to overrule *Bullington* v. *Missouri*, 451 U. S. 430 (1981), a case it had "decided only three years ago." *Amicus* submits that it is now time for a re-examination of *Bullington*. The perspective of time, this Court's retreat from *Bullington* in *Poland* v. *Arizona*, 476 U. S. 147 (1986), and *Bullington*'s possible spread outside the death penalty all provide reasons to re-examine this 12-year-old decision.

A. The Limits of Stare Decisis.

While *stare decisis* is an important doctrine serving a useful social policy, it does not have the same force as a statute or the Constitution. The Judiciary's role in our society is as an interpreter of laws. See The Federalist No. 78, at 467 (A. Hamilton) (Rossiter ed. 1961). Therefore, *stare decisis*, while respected, cannot deter this or any other court from its ultimate duty of interpreting the law. *Stare decisis* is the servant, not the master, of the law.

This Court has recognized that the doctrine does not have the force of a rule of law and may be overridden when appropriate. "Whether it [*stare decisis*] shall be followed or departed from is a question entirely within the discretion of the court . . . ." *Hertz* v. *Woodman*, 218 U. S. 205, 212 (1910). While it will be followed in most cases, this is only because usually "it is more important that the applicable rule of law be settled than it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting).

Perhaps the most important factor in limiting *stare decisis* is the ability of other bodies to overturn this Court's decisions. This Court is particularly reluctant to overturn its own statutory interpretations, because Congress "remains free to alter what [this Court has] done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172-173 (1989).

Constitutional cases are another matter. Because " 'correction through legislative action is practically impossible,' " constitutional cases are more prone to re-examination than statutory cases. *Payne* v. *Tennessee*, 115

L. Ed. 2d 720, 737, 111 S. Ct. 2597, 2610 (1991) (quoting *Burnet*, *supra*, 285 U. S., at 407 (Brandeis, J., dissenting)); cf. *Patterson*, *supra*, 491 U. S., at 172-173. Given the necessary tension between our democratic ideals and judicial review under the Constitution, see Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693, 695-696 (1976), this Court must be ready to re-examine its constitutional decisions in order to maintain the democratic nature of our society.

Refusing to re-examine an incorrect opinion that the public cannot overturn is corrosive to this Court's public respect. Thus the decision to uphold the incorrectly decided line of cases under *Lochner* v. *New York*, 198 U. S. 45 (1905) until 1937 helped to damage this Court as a public institution. See *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 704-705, 112 S. Ct. 2791, 2812 (1992) (lead opinion). "Of course it is embarrassing to confess a blunder; it may prove even more embarrassing to adhere to it." *United States* v. *Bryan*, 339 U. S. 323, 346 (1950) (Jackson, J., concurring).

This Court is also more willing to re-examine decisions that have developed contradictions over time. Thus, this Court will not allow *stare decisis* to preserve inconsistent or difficult to administer decisions. See *Patterson*, *supra*, 491 U. S., at 173. Similarly, if the conditions that motivated a decision change, then there is good reason to overrule the prior decision. See *Casey*, *supra*, 120 L. Ed. 2d, at 700, 112 S. Ct., at 2809 (lead opinion).

The fact that *stare decisis* is not a "mechanical rule" is demonstrated by the hierarchy within the doctrine. While some decisions are virtually etched in stone, others warrant more flexibility. For those cases less worthy of *stare decisis*, " 'the process of trial and error so fruitful in the physical sciences is appropriate also in the judicial function.' " *United States* v. *Scott*, 437 U. S. 82, 101 (1978) (quoting *Burnet*, *supra*, 285 U. S., at 408 (Brandeis, J., dissenting)).

B. Bullington as Precedent.

When deciding whether *stare decisis* should preserve a decision from re-examination, this Court "is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 700, 112 S. Ct. 2791, 2808 (1992) (lead opinion). This involves a look into the type of decision involved, the reliance interest it invokes, and what impact overruling the decision would have on the public's perception of the rule of law. See part I A, *ante*, at 3-4. In light of these factors, *Bullington* v. *Missouri*, 451 U. S. 430 (1981) invokes minimal protection from *stare decisis*.

1. Contrary to precedent.

The strongest argument against *Bullington* is *Bullington*'s own treatment of precedent. The *Bullington* decision cannot be squared with this Court's previous decisions on the relationship between the Double Jeopardy Clause and sentencing. Decisions that do not respect precedent should not be preserved simply as a matter of *stare decisis*. If a decision improperly overrules or distinguishes a set of precedents, *stare decisis* must not prevent a return to the earlier, correct decisions.

The *Bullington* Court understood that there was tension between its decision and prior case law. It framed the issue as whether *Stroud* v. *United States*, 251 U. S. 15 (1919) applied to a modern capital sentencing system. See *Bullington*, *supra*, 451 U. S., at 431-432. The Court found that imposing double jeopardy protections on modern capital sentencing schemes did not conflict with *Stroud* or any other precedents. The earlier decisions which refused to apply double jeopardy to sentences dealt with sentencing proceedings that were less complicated and thus less trial-like than the Missouri death sentence

procedure in *Bullington*. See *id.*, at 438-441. This distinction allowed the *Bullington* Court to impose double jeopardy protections on Missouri's capital sentencing system without formally having to overrule any precedents. See *id.*, at 446.

Bullington distinguished four precedents, *United States* v. *DiFrancesco*, 449 U. S. 117 (1980), *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973), *North Carolina* v. *Pearce*, 395 U. S. 711 (1969),[1] and *Stroud* v. *United States*, *supra*. Each of these cases is at least substantially compromised by the *Bullington* decision. Although *Bullington* claimed that it did not overrule these decisions, the effect of *Bullington* was to make these cases shadows of their former selves.

The first case distinguished, *Stroud*, provides perhaps the starkest conflict between *Bullington* and earlier precedent. Robert Stroud, the Birdman of Alcatraz,[2] was convicted of first-degree murder for killing a guard at Leavenworth prison and sentenced to death. His conviction was reversed, he was retried and again convicted of first-degree murder, but this time only sentenced to life. This conviction was also reversed and at his second retrial Stroud was again found guilty of first-degree murder and sentenced to death. 251 U. S., at 16-17. Stroud challenged his last death sentence as being barred under double jeopardy by the life sentence imposed after the first retrial. *Id.*, at 17.

The *Stroud* Court held that sentencing was irrelevant to the Double Jeopardy Clause. "The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first-degree murder." *Id.*, at 18. The *Stroud* Court understood

1. The companion case to *Pearce*, *Simpson* v. *Rice*, was overruled on other grounds in *Alabama* v. *Smith*, 490 U. S. 794, 802-803 (1989).

2. See *Chaffin*, *supra*, 412 U. S., at 23.

that jeopardy attached to acquittals from guilt, not sentences.[3] "The protection afforded by the Constitution is against a second trial for the same *offense*." *Ibid.* (emphasis added).

Bullington's attempt to distinguish *Stroud* is unsuccessful. It is true that *Stroud* and *Bullington* dealt with different sentencing procedures. *Stroud* involved a relatively uncomplicated system where the jury was simply asked whether defendant should not be given a death sentence, see *Bullington*, *supra*, 451 U. S., at 439, n. 11, while *Bullington* dealt with one of the death penalty proceedings that evolved after *Furman* v. *Georgia*, 408 U. S. 238 (1972). But this difference is irrelevant for the purpose of double jeopardy.

Double jeopardy is not imposed because a proceeding is relatively complicated, but because the proceeding involves the most important decision the law can make, whether a person is guilty of a crime. This is demonstrated in *United States* v. *Dixon*, 61 U. S. L. W. 4835 (June 28, 1993), where this Court held that the Double Jeopardy Clause applied to nonsummary criminal contempt proceedings. It did so not because of how the proceedings were conducted, but because of what was at stake at the contempt proceedings. "It is well established that criminal contempt, at least the sort enforced through nonsummary proceedings, is '*a crime in the ordinary sense*.' " *Id.*, at 4837, quoting *Bloom* v. *Illinois*, 391 U. S. 194, 201 (1968) (emphasis added). As other constitutional protections applied to nonsummary contempt proceedings "just as they do in other criminal prosecutions," there was no reason not to apply the Double Jeopardy Clause. *Ibid.*

3. Double jeopardy does place one limit on sentences. It prevents a person from being punished twice for the same crime. See *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 176 (1874). Neither *Bullington* nor the present case involves this type of multiple punishment.

In using the trial-like nature of Missouri's death sentence procedure to impose double jeopardy protections, *Bullington* placed the cart before the horse. Whether a proceeding is like a trial does not determine what constitutional rights it invokes; what matters is what is at stake. Thus in *In re Oliver*, 333 U. S. 257 (1948), this Court held that defendant had a right to a public trial in a contempt proceeding held by a "one-man grand jury." The grand jury could hold a witness in contempt without affording the witness anything resembling a trial. *Id.*, at 262. In spite of the fact that this proceeding in no way resembled a trial, the right to public trial was imposed because of the serious consequences of a contempt finding.

> "Here we are concerned, not with petitioner's rights as a witness in a secret grand jury session, but with his rights as a defendant in a contempt proceeding. The powers of the judge-grand jury who tried and convicted him in secret and sentenced him to jail on a charge of false and evasive swearing must likewise be measured, not by the limitations applicable to grand jury proceedings, *but by the constitutional standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment or both.*" *Id.*, at 265 (emphasis added).

Eventually, this Court added so many rights to the nonsummary contempt proceeding that it now resembles a trial. See *Dixon*, *supra*, 61 U. S. L. W., at 4837. But these were imposed not because of the complexity of the proceedings, but because of the consequences of a contempt finding.

Bullington also implied that the fact that the death penalty was involved made the sentencing hearing more like a trial. See 451 U. S., at 445. This placed *Bullington* in direct conflict with *Stroud*. The *Stroud* juries had to make the same decision as the juries in *Bullington*, whether defendant should be sentenced to death or

imprisonment. This was a very important decision. It did not, however, influence the *Stroud* Court. This was still no more than a sentencing question. As it did not go to the question of guilt, double jeopardy was irrelevant. See 251 U. S., at 18.

The law of capital punishment did change between *Stroud* and *Bullington*. Starting with *Furman* v. *Georgia*, *supra*, this Court has invoked the Eighth Amendment to make radical changes in how, when and against whom the death penalty is imposed. But *Bullington* is not an Eighth Amendment case. In support of its "death is different" argument, *Bullington* relies on *Green* v. *United States*, 355 U. S. 184 (1957), *United States* v. *DiFrancesco*, 449 U. S. 117 (1980), *Addington* v. *Texas*, 441 U. S. 418 (1979), and *Burks* v. *United States*, 437 U. S. 1 (1978). *Bullington*, *supra*, 451 U. S., at 445-446. None of these cases involved the Eighth Amendment or capital punishment. See *Green*, *supra*, 355 U. S., at 185-186; *DiFrancesco*, *supra*, 449 U. S., at 120-121; *Addington*, *supra*, 441 U. S., at 419-420; *Burks*, *supra*, 437 U. S., at 2. Death may be different under the Eighth Amendment, but until the *Bullington* Court chose to bypass *Stroud*, death was not different for the purposes of the Double Jeopardy Clause.

North Carolina v. *Pearce*, *supra*, showed that lessons of *Stroud* were undiminished after 50 years. In *Pearce*, a non-capital case, defendant won a reversal of his first conviction, and was given a higher sentence upon being convicted at retrial. 395 U. S., at 713. The fact that the first sentence was shorter did not invoke double jeopardy. "Long-established constitutional doctrine makes clear that, beyond the requirement already discussed,[4] the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction." *Id.*, at 719.

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4. That time served under the first sentence must be credited against whatever sentence is imposed after retrial. *Id.*, at 718-719.

This decision was the logical extension of the government's power to retry defendant following most reversals. "At least since 1919, when *Stroud* v. *United States*, 251 U. S. 15, was decided, it has been settled that a corollary of the power to retry defendant is the power, upon the defendant's reconviction, *to impose whatever sentence may be legally authorized*, whether or not it is greater than the sentence imposed after the first conviction." 395 U. S., at 720 (emphasis added).

Bullington sought to distinguish *Pearce* on the ground that it did not involve a separate sentencing proceeding. *Bullington*, *supra*, 451 U. S., at 439. Because the sentencer in *Pearce* had a wide range of potential sentences and no standards for guidance, this decision could not be compared to the one in *Bullington*. *Ibid*. Yet *Pearce* did not turn on how the sentence was arrived. Instead, it recognized that punishment and guilt are two separate issues, and only the latter invokes the Double Jeopardy Clause.

Chaffin v. *Stynchcombe*, 412 U. S. 17 (1973) received the same treatment from the *Bullington* Court as *Pearce*. *Chaffin* held that the underlying rationale of *Pearce* applies to jury sentencing as well as judge sentencing. *Id*., at 18. *Chaffin* reaffirmed both *Stroud* and *Pearce*, declining any invitation to overrule them. See *id*., at 24. *Bullington*'s effort to distinguish *Chaffin* by the nature of the proceeding was as unsuccessful as its effort to distinguish *Pearce*.

The final case distinguished by *Bullington*, *United States* v. *DiFrancesco*, *supra*, shows how far *Bullington* had to stretch to avoid precedent. DiFrancesco was convicted in federal court of racketeering offenses, and had his sentence enhanced as a dangerous special offender. 449 U. S., at 122. The United States appealed the dangerous offender sentence, claiming that the trial court abused its discretion in sentencing defendant to only one extra year for being a dangerous offender. See *id*., at 123. The

Court of Appeals dismissed the government's appeal on double jeopardy grounds. *Ibid*.

This Court held that the government's appeal of a sentence was not barred by double jeopardy. Appeal of a sentence could violate double jeopardy only if the initial sentence was viewed as an acquittal of any higher sentence. *Id*., at 133. Neither history nor precedent could support this proposition. Historically, pronouncement of sentence never carried the same finality that an acquittal did. *Ibid*. This was important because the "Double Jeopardy Clause was drafted with common-law protections in mind." *Id*., at 134.

Allowing the government to appeal a sentence was a natural application of *Stroud*, *Pearce*, and *Chaffin*. These cases "clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal." See *id*., at 134-135. Any other result would overrule *Pearce*. See *id*., at 136, n. 14.

The sentencing proceeding in *DiFrancesco* had all the accoutrements of a trial. The dangerous special offender finding could be made only after a hearing in which defendant had a right to counsel, compulsory process, and cross-examination. The enhancement was imposed only if the trial court found by a preponderance of the evidence that defendant is a dangerous special offender. *Id*., at 118-119, n. 1.

In spite of the great similarity between this proceeding and the one in *Bullington*, the *Bullington* Court felt that it could distinguish *DiFrancesco*. First it noted that *DiFrancesco* involved only an "appellate review of a sentence 'on the record of the sentencing court,' [18 U. S. C.] § 3576, not a *de novo* proceeding that gives the Government the opportunity to convince a second factfinder of its view of the facts." *Bullington*, *supra*, 451 U. S., at 440. Yet *DiFrancesco* itself flatly rejected that very distinction. "While *Pearce* dealt with the imposition of a new sentence after retrial rather than as [in *DiFrancesco*], after appeal,

that difference is no more than a 'conceptual nicety.' " 449 U. S., at 135-136 (emphasis added). The issue in *DiFrancesco* was "whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal." *Id.*, at 132.

The Court understood that there were "*fundamental distinctions* between a sentence and an acquittal, and to fail to recognize them is to ignore the particular significance of an acquittal." *Id.*, at 133 (emphasis added). This, not the particular procedures of the sentencing hearing, formed the basis of the holding in *DiFrancesco*.

Bullington's distinction cannot be squared with the rest of double jeopardy law. The government cannot appeal after an acquittal. *United States* v. *Wilson*, 420 U. S. 332, 352 (1975). If an appellate court reversed an acquittal and imposed a conviction on its own accord, it would be no less a violation of double jeopardy than if the government could retry an acquittal. See *Kepner* v. *United States*, 195 U. S. 100, 133 (1904). Yet *Bullington*, in its effort to avoid overruling *DiFrancesco*, would turn this difference into a distinction of constitutional significance. In so doing, it adds *Wilson* and *Kepner* to the list of precedents it flouts.

Bullington next tried to distinguish *DiFrancesco* on the ground that *DiFrancesco* involved a sentencing scheme where the judge had a far broader choice of possible sentences than the one in *Bullington*. *Bullington*, *supra*, 451 U. S., at 440-441. Once again, this is a distinction without any constitutional difference. *DiFrancesco* did not turn on the fact that the sentencer could impose any sentence not to exceed 25 years, a fact it only mentions in passing. See *DiFrancesco*, *supra*, 449 U. S., at 118-119, n. 1. The *DiFrancesco* Court relied in part upon *Stroud*, where, as in *Bullington*, the sentencing jury only had two options, life imprisonment or death. See *id.*, at 135 (citing *Stroud*); *Stroud*, *supra*, 251 U. S., at 17-18.

Finally, the *Bullington* Court attempted to distinguish the trial-like nature of the special offender hearing in *DiFrancesco* on the ground that it only required the prosecution to prove its case by a preponderance of the evidence, while the sentencing system in *Bullington* required proof beyond a reasonable doubt. 451 U. S., at 441. This distinction places too much emphasis on what is an anomaly of Missouri's capital sentencing scheme.

Many state capital sentencing schemes have a reasonable doubt standard for the eligibility finding but not for the final sentencing decision. See, *e.g.*, *People* v. *Frierson*, 25 Cal. 3d 142, 180, 599 P. 2d 587 (1979) (upholding California's 1977 death penalty law). This Court has upheld such systems. See, *e.g.*, *Pulley* v. *Harris*, 465 U. S. 37 (1984) (affirming California's 1977 law). If *Bullington* distinguished *DiFrancesco* because Missouri imposed the reasonable doubt standard on the final sentencing decision, then *Bullington* is based upon a procedural anomaly of Missouri's death penalty law. If the *Bullington* Court was referring to the fact that Missouri imposes the reasonable doubt standard for eligibility, then this decision is much narrower than commonly thought; it would not preclude resentencing a defendant to death if the first jury found him eligible but sentenced him to life. It would also be much more in conflict with *Poland* v. *Arizona*, 476 U. S. 147, 155-156 (1986) which declined to extend *Bullington* to eligibility findings. This would further weaken *Bullington* as precedent. See part I B 3, *post*, at 16-18.

DiFrancesco did not turn on the standard of proof. It was a continuation of cases starting with *Stroud* that jeopardy does not attach to the decision of the sentencer. The burden of proof for imposing a sentence was irrelevant to double jeopardy analysis until *Bullington*.

If *stare decisis* is to have any authority, cases must be distinguished only upon meaningful grounds. Any case can be "distinguished" from a prior decision. There will

always be some difference in the procedural posture or factual setting that will support a claim that the cases are different. If trivial differences are enough to distinguish cases, then *stare decisis* will have no meaning.

"[T]o view stare decisis as requiring identical decision only upon identical material facts as they are seen by the nonprecedent court . . . is to impose little constraint by the doctrine. Stare decisis, so loosely understood, leaves the nonprecedent court free to avoid the bonds of preceding cases by recasting their material facts *or assigning reasons to the prior decisions quite distinct from those originally assigned*. With this leeway, courts will seldom be faced with the necessity for explicit overruling." Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. Rev. 1, 9, n. 37 (1979) (emphasis added).

Stroud, *Pearce*, *Chaffin*, and *DiFrancesco* all stand for one principle, that double jeopardy does not prevent the imposition at a later proceeding of a higher sentence that had been imposed at an earlier proceeding. In *Bullington*, this Court said that there were times when double jeopardy prevents imposing a higher sentence at a later hearing. Thus *Bullington* and *DiFrancesco* have been an example of this Court rendering mutually inconsistent decisions. See Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802, 811, n. 25 (1982). *Stare decisis* requires that this inconsistency be resolved.

This Court must resolve conflicts between its precedents. If a decision contradicts the principles of an earlier case, confusion in the lower courts is inevitable. If two decisions are in conflict, *stare decisis* does not prevent a return to an earlier correct decision. See *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940).

The resulting confusion weakens respect for the rule of law. Until this Court intervenes and decides which precedent prevails, the lower courts will have to struggle with the conflicting edicts from this Court. As similarly situated litigants are treated differently, people will

wonder whether the cases are decided by the rule of law, or personal fiat.

Inconsistent authorities also undermines confidence in judicial review.

> "[T]he Court's institutional position would be weakened were it generally perceived that the Court itself views its own decisions as little more than 'a restricted railroad ticket, good for this day and train only.' If courts are viewed as unbound by precedent, and the law as no more than what the last Court said, considerable efforts would be expended to get control of such an institution—with judicial independence and public confidence greatly weakened." Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 753 (1988) (footnotes omitted) (quoting *Smith* v. *Allwright*, 321 U. S. 649, 669 (1944) (Roberts, J., dissenting)).

Bullington's cavalier avoidance of prior authority is the type of situational decision that can only undermine respect for *stare decisis* and this Court.

2. *Type of decision.*

The problems caused by *Bullington* are particularly severe because of the type of decision it is. *Bullington* is a constitutional decision, and unless the Constitution is amended, overruling is the only other method of correcting its errors. Thus constitutional decisions are traditionally afforded less *stare decisis* protection than statutory decisions, which are always susceptible to congressional action.

Some constitutional decisions warrant more *stare decisis* protection than others. These involve particularly divisive national controversies that this Court's decision has substantially resolved. See *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 708, 112 S. Ct. 2791, 2815 (1992).

Bullington is not such a case. While it is important, the Double Jeopardy Clause has not and is not likely to divide the country. It involves the sort of technical issue that the lay public is unlikely to understand well, if at all. Cf. Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 737 (1949). Double jeopardy is a very complicated part of the law. See *DiFrancesco*, *supra*, 449 U. S., at 127. Therefore, this Court has periodically reversed course and overruled prior double jeopardy decisions. See, *e.g.*, *United States* v. *Scott*, 437 U. S. 82, 87 (1978) (overruling *United States* v. *Jenkins*, 420 U. S. 358 (1975)); *Burks* v. *United States*, 437 U. S. 1, 6-10, 18 (1978) (overruling several prior cases); *United States* v. *Dixon*, 61 U. S. L. W. 4835, 4841 (June 28, 1993) (overruling *Grady* v. *Corbin*, 495 U. S. 508 (1990)). *Stare decisis* is at its weakest in this most technical part of the law.

3. Poland v. Arizona.

Bullington's potential for confusion is also demonstrated by this Court's retreat from it in *Poland* v. *Arizona*, 476 U. S. 147 (1986). In *Poland*, a capital case, the trial court erroneously held that a murder committed during an armed robbery could not support a murder for pecuniary gain finding. It nonetheless sentenced the defendants to death because it found that the murders were "especially heinous, cruel or depraved." *Id.*, at 149. The Arizona Supreme Court reversed the guilty verdict, found that there was insufficient evidence to support the especially heinous circumstance, and noted that murder for pecuniary gain was supported by armed robbery murder. On retrial, the defendants were again convicted on first-degree murder and again sentenced to death on the pecuniary gain, especially heinous grounds. *Id.*, at 149-150. The Arizona Supreme Court upheld the death sentences for both defendants on the pecuniary gain grounds. *Id.*, at 151.

This Court upheld the sentences, finding no conflict with *Bullington*. The *Poland* Court held that applying

double jeopardy to individual aggravating circumstances would require viewing "the capital sentencing hearing as a series of minitrials . . . . " *Id.*, at 156. This would push *Bullington*'s trial analogy "past the breaking point" and thus was unacceptable. *Ibid.*

While the decision not to extend *Bullington* was proper, it is very difficult to harmonize *Poland* with the rationale of *Bullington*. *Bullington* held that the decision not to impose death constituted an acquittal because the Missouri sentencing procedure that decided this issue was so like a trial. See *Bullington*, *supra*, 451 U. S., at 438. Using the same reasoning, this Court applied double jeopardy to Arizona's capital sentencing hearing. See *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). In Arizona, the decision on an individual aggravating circumstance is made at this same trial-like capital sentencing hearing. See *id.*, at 210. Like the penalty question in *Bullington*, in Arizona "[t]he usual rules of evidence govern the admission of evidence of aggravating circumstances, and the State must prove the existence beyond a reasonable doubt." *Id.*, at 210.

In spite of this near synonymity, the *Poland* Court refused to apply *Bullington*. The *Poland* Court asserted that its case was different because there had never been a verdict of life imprisonment. See *Poland*, *supra*, 476 U. S., at 154. Yet this runs contrary to double jeopardy principles. Once an appellate court finds that there was insufficient evidence to support a conviction, double jeopardy prevents retrial. *Burks* v. *United States*, 437 U. S. 1, 16 (1978). Furthermore, an erroneous acquittal is also protected under double jeopardy. *Sanabria* v. *United States*, 437 U. S. 54, 68-69 (1978). Thus the fact that the Arizona Supreme Court held that there was an improperly denied aggravating circumstance is irrelevant for double jeopardy purposes.

Poland represents a headlong retreat from the trial metaphor of *Bullington*. "[W]hen confronted in *Poland*

with the logical conclusion of the course it set in *Bullington*, the Court contents itself with a statement which in essence says simply: 'We will not go that far.' " Bennett, Double Jeopardy and Capital Sentencing: The Trial and Error of the Trial Metaphor, 19 N.M.L. Rev. 451, 465 (1989). When this Court backs off from a significant portion of a precedent, it is strong evidence that the precedent is unworkable and should be re-examined. Cf. *United States* v. *Dixon*, 61 U. S. L. W. 4835, 4840 (June 28, 1993) (decision in *United States* v. *Felix*, 118 L. Ed. 2d 25, 112 S. Ct. 1377 (1992), creating large exception to *Grady* v. *Corbin*, 495 U. S. 508 (1990), demonstrates the need to overrule *Grady*). After *Poland*, *Bullington* is an anomaly in the law, contradicted by cases decided before and after it.

When developments in the law rob a decision of its authority, it is time to re-examine the old decision. See *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989). When a case contradicts "an 'unbroken line of decisions' . . . and has produced 'confusion' it is time to re-examine the precedent." *Dixon*, *supra*, 61 U. S. L. W., at 4841. Therefore, a re-examination of *Bullington* is in order.

II. *Bullington* should be overruled.

A. Wrongly decided.

When deciding whether a practice should invoke the Double Jeopardy Clause, this Court has looked to the historical treatment of the practice, this Court's precedents, and the underlying purpose of the Double Jeopardy Clause. See *United States* v. *DiFrancesco*, 449 U. S. 117, 132 (1980). Viewed through this analysis, sentencing, regardless of the procedural form it takes, cannot invoke the Double Jeopardy Clause's protection against retrial. *Bullington* failed to apply this analysis to the issue before it, and therefore was improperly decided.

1. History.

History is the most important tool for interpreting the Double Jeopardy Clause. Double Jeopardy is amongst our oldest legal principles, with roots as far back as Greek and Roman law. See J. Sigler, Double Jeopardy 2 (1969). While double jeopardy had an initially rocky start under the common law, Coke and Blackstone enshrined it as a part of England's legal heritage. See *id*., at 16-20. The Founders recognized the importance of this heritage and used Blackstone's definition as the basis of the Double Jeopardy Clause. See *United States* v. *Wilson*, 420 U. S. 332, 340-342 (1975). "The common law is important in the present context, for our Double Jeopardy Clause was drafted with the common-law protections in mind." *DiFrancesco*, *supra*, 449 U. S., at 134.

At the common law, the prohibition took the form of three pleas: *auterfoits acquit*, former acquittal; *auterfoits convict*, former conviction; and *auterfoits attaint*, former attainder. See 4 W. Blackstone, Commentaries *335-336 (1769). The first two interests are protected under the Double Jeopardy Clause, while former attainder is now obsolete. See *Sigler*, *supra*, at 18. The sentencing practices in *Bullington* and the present case invoke neither former acquittal nor former conviction.

Historically, neither of these protections were invoked by the pronouncement of sentence. The only limit on sentencing was the prohibition against punishing someone again after they had already completed the imposed sentence, or imposing a sentence greater than that allowed by law. See *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 176 (1874). Neither of these prohibitions was invoked in *Bullington* or the present case. This is the furthest that double jeopardy extends into sentencing.

"Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal. The common law writs of *autre fois acquit* and *autre fois convict* were protections against retrial." *DiFrancesco*,

supra, 449 U. S., at 133. As imprisonment became the more common form of punishment, this distinction became more important. Thus a trial court could increase a sentence without violating double jeopardy, so long as it was done during the same term of the court as the initial sentence. See *Lange*, *supra*, 18 Wall., at 167. Similarly, it was "established practice in the federal courts that the sentencing judge may recall the defendant and increase his sentence, at least . . . so long as he has not yet begun to serve that sentence." *DiFrancesco*, *supra*, 449 U. S., at 134.

The Double Jeopardy Clause states that: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U. S. Const. Amend. V. This language was adopted to prevent the retrial of an acquitted defendant, while at the same time allowing a defendant to seek a new trial on appeal from the conviction. See *Wilson*, *supra*, 420 U. S., at 341. Thus, allowing a retrial after defendant's conviction is reversed[5] "is a well-established part of our constitutional jurisprudence." *United States* v. *Tateo*, 377 U. S. 463, 465 (1964). This principle is the basis for the modern distinction between sentencing and conviction. "[I]t rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *North Carolina* v. *Pearce*, 395 U. S. 711, 721 (1969). As the slate has been "wiped clean" any legal sentence may be imposed upon retrial.[6]

> "But, so far as the conviction itself goes, and that part of the sentence that has not yet been served, it is no more than a simple statement of fact to say that the slate *has* been wiped clean. The conviction *has* been set aside, and the unexpired portion of the original sentence will never be served. A new trial may result in an acquittal. But if it does result in a conviction, we cannot say that the constitutional guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment for the offense in question. To hold to the contrary would be to cast doubt upon the whole validity of the basic principle enunciated in *United States* v. *Ball*, *supra*, and upon the unbroken line of decisions that have followed that principle for almost 75 years." *Id.*, at 721 (emphasis in original).

5. Except when the reversal is for insufficient evidence. See *Burks* v. *United States*, 437 U. S. 1, 16 (1978).

6. Provided that any judge-imposed sentence is not vindictively higher than the original sentence and thus a violation of due process. See *id.*, at 726.

This principle is derived from the original intent behind the particular language of the Double Jeopardy Clause. The Clause was adopted in its particular form so that defendant could be tried and sentenced again after obtaining a reversal. Logic compels us to recognize, as the *Pearce* Court did, that if the slate is clean for the conviction, it must be so for the sentence.

The *Bullington* Court did not attempt any in-depth historical analysis of its position. While it made great efforts to distinguish the many cases its holding conflicted with, it ignored history. This failure to deal with history now warrants reversal.

"We may mystify any thing. But if we take a plain view of the words of the Constitution and give them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation." *Ex parte Siebold*, 100 U. S. 371, 393 (1880). It is time to bring the Double Jeopardy Clause back from *Bullington*'s "depth of speculation."

2. Precedent.

In addition to ignoring history, *Bullington* also has no support in precedent. Its contradiction of prior decisions, primarily *United States* v. *DiFrancesco*, *supra*; *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973); *North Carolina* v. *Pearce*, *supra*; and *Stroud* v. *United States*, 251 U. S. 15 (1919) and its contradiction by *Poland* v. *Arizona*, 476 U. S. 147 (1986) are discussed extensively earlier in this brief. See part I B 1 & 3, *ante*, at 5-15, 16-18. In addition to weakening *stare decisis* support for the case, the fact that *Bullington* contradicts prior decisions and is contradicted by subsequent cases also provides a good reason for overruling *Bullington*. See *United States* v. *Dixon*, 61 U. S. L. W. 4835, 4841 (June 28, 1993).

3. Contrary to principles.

In addition to being contrary to history and precedent, *Bullington* is contrary to the general principles that form the foundation of the Double Jeopardy Clause. In its effort to distinguish *North Carolina* v. *Pearce*, *supra*, the *Bullington* Court called forth this Court's classic statement of the principles of the Double Jeopardy Clause.

> " 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Bullington*, *supra*, 451 U. S., at 445 (quoting *Green* v. *United States*, 355 U. S. 184, 187-188 (1957)).

Green recognizes two key protections are provided by the Double Jeopardy Clause: protecting the innocent from being convicted, and protecting the defendant from government harassment through repeated litigation.

Neither of these principles were violated by the state courts in *Bullington* or the present case.

Of these two goals, protecting the innocent is the most important. It is a fundamental principle of our criminal justice system that we must make all reasonable efforts to avoid convicting the innocent. Thus it is better to let ten guilty persons go free than to convict one innocent person. See 4 W. Blackstone, Commentaries *358 (1769).

Sentencing never comes into conflict with this principle. Before a defendant is sentenced, he must first be found guilty.

The second principle of *Green*, protecting defendants from harassment, is related to protecting the innocent. In addition to running the risk that an innocent person may be convicted, the threat of retrial may coerce an innocent person into pleading guilty to a lesser charge.

This is perhaps the most important part of double jeopardy. The ability to use its resources to coerce any citizen to do its will is an essential tool of the totalitarian state. Thus double jeopardy was foreign to the criminal law of Nazi Germany, Fascist Italy, and the pre-Khrushchev Soviet Union. See Sigler, *supra*, at 145-146.

As it relates to innocence, the ability of the state to wear down individuals is not invoked by sentencing. What matters is the issue of guilt. Until a person is found guilty, sentencing is irrelevant.

The Double Jeopardy Clause protects more than the innocent. It will even preserve an apparently erroneous acquittal. See *Green*, *supra*, 355 U. S., at 188. This serves double jeopardy's general protection against harassment. This interest is not served by treating a lesser sentence as an acquittal of a greater one.

Green fought to protect all acquitted defendants from undergoing additional "embarrassment, expense and ordeal." See *id.*, at 187. A new sentencing hearing cannot cause a defendant any further embarrassment. He

has already been convicted of a crime, the sentencing hearing simply determines his just deserts. Nor should the extra expense of the sentencing hearing justify double jeopardy protection. A resentenced defendant has already been through at least a trial, a sentencing hearing, and a successful appeal before being resentenced. Many will also have been through a second trial at their own request. See, *e.g.*, *Bullington*, *supra*, 451 U. S., at 436. Given the large proportion of defendants for whom the state pays defense costs, the additional expense of a second sentencing hearing is usually *de minimis*.

Nor is a new sentencing hearing a particularly harsh ordeal for defendant. He has already been through the ordeal of being convicted and is about to experience the ordeal of punishment. The sentencing hearing is simply the means of determining the extent of his future punishment. The fact that a higher sentence is imposed at the second hearing does not change this calculus. "The possibility of higher sentence was recognized and accepted as a legitimate concomitant of the retrial process." *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 25 (1973).

Green also sought to protect defendants from the continued anxiety and insecurity caused by retrial. 355 U. S., at 187. Whatever extra anxiety and insecurity is caused by a new sentencing hearing is not of constitutional magnitude. The defendant has already been found guilty. He knows he is going to be punished, the only issue is how much. As *Chaffin* recognized, the possibility of a higher sentence after retrial is a legitimate part of retrial. 412 U. S., at 25.

Bullington attempts to make resentencing a greater cause of anxiety and ordeal when the death penalty is involved. *Bullington*, *supra*, 451 U. S., at 445. This is one of the most dangerous arguments in *Bullington*. While the death penalty has been treated differently than other sentences under the Eighth Amendment, the "death is different" argument has been confined to that part of the

criminal law. *Bullington*, by using this rationale to support an expansion of the Double Jeopardy Clause, threatens to make both death penalty procedure and the rest of constitutional criminal procedure needlessly complicated. Death penalty procedure is already complicated enough, there is no reason to make it more so by importing special rules to the rest of a defendant's constitutional rights. Similarly, double jeopardy is complicated enough as it is. See *United States* v. *DiFrancesco*, 449 U. S. 117, 126-127 (1980) (citing extensive and often inconsistent case law). There is no reason to further complicate it by imposing Eighth Amendment concepts.

While the sentencer's choice between a life sentence and death is important, this decision must be viewed in this context. A defendant facing this decision has already been convicted of a capital crime. A death sentence, so long as it is imposed in accordance with the Eighth Amendment, is a lawful sentence and should be treated the same as any other sentence. See *Bullington*, *supra*, 451 U. S., at 451-452 (Powell, J., dissenting).

B. Punishing Good Deeds.

In addition to being contrary to the law, *Bullington* also sets a disturbing example to the states. An important reason for its decision to extend the Double Jeopardy Clause to Missouri's capital sentencing scheme was the fact that it used the reasonable doubt standard. *Bullington* v. *Missouri*, 451 U. S. 430, 441 (1981). In the present case, the Eighth Circuit applied double jeopardy to Missouri's persistent offender hearing for the same reason. See *Bohlen* v. *Caspari*, 979 F. 2d 109, 113 (CA8 1992). Yet there is no constitutional requirement that sentencing findings be proved beyond a reasonable doubt. See part I B 1, *ante*, at 5. In other contexts, this Court has explicitly rejected the assertion that the sentencing decision requires all the protections of the guilty determination. See *Walton* v. *Arizona*, 497 U. S. 639, 647-648 (1990) (jury trial). *Bullington* and the case below, by

imposing greater constitutional burdens on a state procedure because it is more helpful to defendant, encourage states to provide the accused with only the minimum procedural protection. The chilling effect this has on state criminal procedure warrants overruling *Bullington*.

The Double Jeopardy Clause does not protect in measured steps. "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced . . . ." *Burks* v. *United States*, 437 U. S. 1, 11, n. 6 (1978). This absolutism will in turn give appellate courts reason to review the factual basis of a sentence less strictly. "From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they are now in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." *United States* v. *Tateo*, 377 U. S. 463, 466 (1964). The same reasoning applies to the sentencing hearing.

Bullington's continued existence will also cause states to withdraw protections from defendants in order to avoid the Double Jeopardy Clause. See, *e.g.*, *Swisher* v. *Brady*, 438 U. S. 204, 210-212 (1978) (state court changing juvenile court rules in response to district court ruling that state's juvenile justice system violated double jeopardy). Putting more structure into sentencing, making it more trial-like, may well be to defendant's benefit. Such structure would make them less subject to individual judges' whims and prejudices. Yet *Bullington* latches on to the trial-like aspect of the sentencing proceeding to extend the reach of the Double Jeopardy Clause.

Unless *Bullington* is removed, states will have every reason to weaken defendant's protections in order to avoid additional constitutional burdens. If the state can restructure a proceeding so that there is no chance of a double jeopardy violation, but the ultimate impact on defendant is the same or worse than had proceeding

remained unchanged, there is no reason to extend the Double Jeopardy Clause to the original proceeding. See *United States* v. *DiFrancesco*, 449 U. S. 117, 142 (1980). Substance, not form, is supposed to govern the Double Jeopardy Clause. See *ibid*.

Amicus submits that *Bullington* should be overruled. Any attempt to salvage *Bullington* "involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940). This prior doctrine was first enunciated in *Stroud* v. *United States*, 251 U. S. 15 (1919), and most recently affirmed in *United States* v. *DiFrancesco*, 449 U. S. 117 (1980). The prior, better rule is simple. A sentencing decision does not have the finality of an acquittal; the Double Jeopardy Clause does not apply.

III. The retroactivity issue is entirely in the state's favor.

Applying *Bullington* v. *Missouri*, 451 U. S. 430 (1981) to noncapital sentences is so obviously a new rule, which could not be applied retroactively on habeas corpus under *Teague* v. *Lane*, 489 U. S. 288 (1989), that *amicus* will not brief the issue.

Teague does not, however, prevent this Court from overruling *Bullington* on habeas corpus even though overruling a prior decision is the definitive new rule under *Teague*. See *Butler* v. *McKellar*, 494 U. S. 407, 412 (1990). Because *Teague* does not prevent retroactive application of new rules favoring the prosecution, however, this Court may overrule *Bullington* in the present case.

Teague is designed to preserve the finality of convictions. See *Teague*, *supra*, 489 U. S., at 309-310. Because of the availability of habeas relief, new rules favorable to defendants can lead to the wholesale reversal of convic-

tions, undermining the finality that is crucial to our criminal justice system. See *id.*, at 309.

New rules favorable to the prosecution do not have this problem. The species of habeas corpus to which *Teague* applies can only be invoked by convicted defendants. See 28 U. S. C. § 2254(a). Double jeopardy will prevent the state from relitigating any acquittals based upon existing procedure. See *Burks* v. *United States*, 437 U. S. 1, 16 (1978). Thus a new rule favoring the state is vastly less disruptive to the system. Convicted defendants do not have as great an interest in finality or reliance on precedent as the state. See *Lockhart* v. *Fretwell*, 122 L. Ed. 2d 180, 191, 113 S. Ct. 838, 844 (1993).

Teague treats defendants and the state differently because they are differently situated.

> "The result of these differences is that the State will benefit from our *Teague* decision in some federal habeas cases, while the habeas petitioner will not. This result is not, as the dissent would have it, a 'windfall' for the State, but instead is a perfectly logical limitation of *Teague* to the circumstances which gave rise to it. *Cessante ratione legis, cessat et ipsa lex.*" *Id.*, 122 L. Ed. 2d, at 191, 113 S. Ct., at 844.

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit should be reversed.

July, 1993

Respectfully submitted,

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